

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

SANTANNA NATURAL GAS CORPORATION)	
d/b/a Santanna Energy Services)	
)	
)	Docket No. 02-0441
Application for Certificate of Service Authority)	
Under §19-110 of the Public Utilities Act,)	

**SANTANNA NATURAL GAS
CORPORATION’S MOTION TO STRIKE
PORTIONS OF TESTIMONY OF DAVID KOLATA
OR, IN THE ALTERNATIVE, TO ALLOW VOIR DIRE OF
MR. KOLATA PRIOR TO PROFFER OF HIS OPINION TESTIMONY**

Santanna Natural Gas Corporation (“Santanna”), by one of its attorneys, Paul F. Markoff of Crowley Barrett & Karaba, Ltd., pursuant to 83 Ill. Admin. Code §§200.190 and 200.680, hereby moves the Commission to strike portions of the testimony of David Kolata (“Kolata”) submitted in the above-captioned matter. In support hereof, Santanna states as follows.

1. The Citizen’s Utility Board (“CUB”) has submitted the *Direct Testimony of David Kolata* and the *Supplemental Testimony of David Kolata*. Exhibit 1 hereto. In his testimony, Kolata freely submits opinions on various topics at issue in this proceeding.
2. Santanna has repeatedly inquired as to Kolata’s qualifications to render expert opinions, but CUB has not provided such a basis.¹
3. Just today, CUB expressly stated that Kolata is not an expert. See *The Citizens Utility Board’s Response to Santanna Natural Gas Corporation’s Motion to Compel*, p. 10.²
4. CUB’s admission begs the question, then, of why Kolata’s expressed opinions should stand.

¹ Today’s order compelling CUB to provide Kolata’s c.v. does not cure this defect, because CUB has still not shown the basis for Kolata’s qualifications to opine on the topics set forth in ¶¶14, *infra*.

5. Illinois “rules of evidence . . . as applied in civil cases in the circuit courts of this State shall be followed” in administrative hearings. 5 ILCS 100/10-40 (West 2002). “The proponent of expert testimony has the burden of demonstrating to the trial court that the proffered opinion is worthy of admission into evidence.” *Volpe v. IKO Indus., Ltd.*, 327 Ill. App. 3d 567, 576, 763 N.E.2d 870, 877 (1st Dist. 2002).

6. Under this burden, CUB must make three specific showings. First, it “must demonstrate that the witness is properly qualified as an expert based on his education, training, experience, or a combination of each . . .” *Ibid.* Second, “the basis of the opinion must be reliable and have gained general acceptance in accordance with *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).” *Ibid.* (internal citations omitted). Illinois law requires that an expert’s opinion must be based on an acceptable foundation of facts, data or opinions. *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981). Additionally, under the *Frye* standard applicable in Illinois, scientific evidence is admissible only if the methodology or scientific principle upon which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs. *Donaldson v. Central Illinois Public Serv. Co.*, 199 Ill.2d 63, 77, 767 N.E.2d 314 (2002). Third, “the witness’s opinion [must] not be based on speculation or conjecture.” *Ibid.* (internal citations omitted). *Volpe*, 327 Ill. App. 3d at 576, 763 N.E.2d at 877. These requirements ensure that testimony is truly expert and sufficiently trustworthy. *See id.* Kolata’s testimony fails to meet any of the three requirements.

7. Kolata has not provided evidence demonstrating that he is a properly qualified expert. “In order to lay a proper foundation for expert testimony, a party must show that the expert has specialized knowledge or experience in the area about which the expert expresses his

² Within the past 2 hours, during a telephone conference, CUB’s counsel advised Santanna’s counsel that CUB would now be proffering Kolata as an expert.

or her opinion.” *Valiulis v. Scheffels*, 191 Ill. App. 3d 775, 785, 547 N.E.2d 1289, 1296 (2d Dist. 1989). Kolata opines on the topics of (a) the adequacy of Santanna’s marketing, billing and customer service materials; (b) slamming practices; (c) the managerial expertise required for a natural gas company; and (d) Santanna’s compliance with 820 ILCS 5/19-115. See *Direct Testimony of David Kolata* and the *Supplemental Testimony of David Kolata*. Exhibit 1.

8. Yet, CUB makes no showing as to Kolata’s qualifications to speak to these topics as an expert. CUB states that Kolata is a “Senior Policy Analyst” at CUB, provides a short description of his job responsibilities, and provides skeletal information about his college degree and post-graduate education. Under Illinois law, this is insufficient to qualify Kolata as an expert to give opinions on any of the subjects listed in paragraphs 4, *supra*, and 14, *infra*. CUB presented no evidence that Kolata’s education and/or experience makes him an expert in the fields of (a) marketing, billing and customer service in the retail natural gas market; (b) slamming practices; (c) managing a natural gas supply company; and (d) compliance with the alternative gas supplier requirements in 820 ILCS 5/19-115.

9. Critically, as set forth above, CUB admits that Kolata is not an expert. See ¶3, *supra*.

10. Furthermore, CUB has not demonstrated Kolata’s expert qualifications. See *Responses of the Citizen’s Utility Board to Santanna Natural Gas Corporation’s First Data Requests Nos. 37, 38* (Exhibit 2 hereto). As such, CUB is estopped to proffer Kolata as an expert.

11. It would be patently unfair for CUB to present Kolata’s allegedly expert opinions, given CUB’s acknowledgment that he is not an expert and without the requisite showing that he is an expert.

12. CUB makes no showing that the facts, data or opinions that Kolata relied upon are customarily relied upon by experts in the field and that his methodology has gained general acceptance.

13. In *Rios v. City of Chicago*, the court held that the trial court should have excluded an expert's opinion testimony where the offering party failed to lay a proper foundation. 771 N.E.2d 1030, 2002 WL 1088176, *5 (1st Dist. May 30, 2002). An expert testified about the cause of the plaintiff's slip and fall. *Id.* The expert relied on the deposition testimony of a deceased witness who described the accident scene in her deposition. *Id.* The First District held that the party offering the expert testimony failed to lay any foundation regarding whether experts in the field customarily rely on that kind of hearsay in forming opinions and failed to lay any foundation regarding whether such reliance was reasonable. *Id.* *Rios* dictates that Kolata's testimony be stricken because CUB has similarly failed to provide the necessary foundation to support Kolata's allegedly expert opinions.

14. As to the third showing, the following portions of Kolata's testimony should be stricken because it is impermissible speculation:

a. Kolata speculates that Santanna has problematic marketing practices based on the number of complaints CUB received regarding Santanna since May of this year. *Kolata Direct Testimony*, p. 6. Kolata bases his opinion on his allegation that CUB received 789 complaints about Ameritech from May to August of 2000. However, Kolata provides no evidence of the number of Ameritech complaints (or that Ameritech acknowledged that it had problems) and attempts no discussion of the circumstances of those complaints or why they are a basis for concluding that Santanna has problematic marketing practices. Further, Kolata speculates that the fact that a particular number of

Santanna customers terminated service, and that a particular number terminated service before they received natural gas, leads to the conclusion that Santanna had problematic marketing practices. Any statements by Kolata concerning the cause and effect regarding those cancellations without discussion of any facts that would support a connection are sheer speculation.

b. Kolata speculates that the fact that thousands of customers cancelled service prior to receiving gas means that it is obvious that customers were not adequately informed. *Kolata Direct Testimony*, p. 6. There is any number of reasons why customers cancel their service before receiving gas. In fact, Santanna's commercial customers have similar cancellation rates. See *Rebuttal Testimony of T. Wayne Gatlin*, pp. 20. Kolata's statements about why customers canceled are sheer speculation.

c. Kolata speculates that Santanna has engaged in a pattern of slamming. *Kolata Direct Testimony*, p. 12. Yet, he discusses only a few alleged incidents and provides no analysis, statistical or otherwise, that would support his statement that Santanna has engaged in such a pattern. As further evidence of the speculative nature of Kolata's testimony, he does not discuss any evidence that any of the alleged incidents of slamming were due to Santanna and not a rogue third party.

d. Kolata speculated that Santanna uses financial incentives that would encourage its sales representatives to "slam" customers. *Kolata Direct Testimony*, p. 12. Kolata stated that compensation to a sales associate is based on that associate's sales. Kolata provides no factual basis whatsoever for his statement. His speculation ignores the fact that marketers did not get paid for new customers unless those customers remained with Santanna for 60 days, which they would not if they were slammed because

they would cancel the unauthorized transfer. Further, Kolata speculates that the fact that Santanna could not describe the third party marketer's training program in detail means that Santanna created an environment in which slamming can occur. *Id.* at 12-13. Kolata selectively quoted the material that he relied upon in order to make it appear that Santanna was not familiar with the training programs. In reality, Santanna provided descriptions of the marketing process, including training and materials. See Santanna responses to Staff data request nos. JH 1.10 and JH 1.16 (Exhibit 3 hereto). Kolata's speculation on this subject must be disregarded.

e. Kolata speculates that Santanna lacks management expertise because it could not describe the third party marketer's training program in detail. *Kolata Direct Testimony*, p. 14. Kolata offers no discussion of facts that would take his statement out of the realm of speculation.

f. Saving his most extreme speculation in his *Direct Testimony* for last, Kolata baldly states that Santanna "illegitimately" voided contracts with commercial customers, which is the subject of a lawsuit. Kolata has not shown that he is an attorney. He has not shown that he is familiar with all of the facts relevant to that case. He has not shown that he is familiar with the governing law in that case. Yet, he concludes that Santanna has engaged in illegal behavior.

g. In Kolata's supplemental testimony, the speculation continues. He speculates that Santanna engaged in "fraudulent" verification procedures. *Kolata Supplemental Testimony*, p. 3. As his basis, Kolata relies on two individual verifications. One of those verifications is adequate, but Kolata's selective quotation of it is an inadequate premise for his conclusion. The only way to reach the conclusion that

Santanna had fraudulent verification procedures from one example of an inadequate verification is to engage in speculation. If Kolata had more examples of inadequate verifications, surely he would have discussed them. His contentment to cite to one example and extrapolate is baseless. Most assuredly, it is not based in sound statistical methodology.

h. Kolata speculates that the mention of the words “sales trick” in one internal Santanna e-mail means that Santanna has fraudulent intent and could not or would not stop the “sales trick.” *Kolata Supplemental Testimony*, pp. 6-8. Kolata’s musing about Santanna’s thought processes are simply speculation. The internal e-mail does not state that any “sales trick” was being used. It indicates that some residential natural gas users were complaining that they thought Santanna representatives were posing as Nicor employees. There is no proof that there was any “sales trick” and CUB’s failure to investigate or offer proof reduces Kolata’s opinion to mere speculation.

i. Throughout his testimony, Kolata assumes that complaints lodged by customers against Santanna are 100% true and accurate. *Contra* Direct Testimony of Joan S. Howard. However, in response to Santanna data requests inquiring about CUB’s verification/investigation procedures for complaints, CUB did not identify any inquiry as to the veracity of complaints. See excerpts (nos. 11 and 14) from CUB Responses to Santanna’s First Set of Data Requests (Exhibit 4 hereto). In a follow-up letter, CUB’s counsel again refused to answer the requests, instead deflecting the issue and citing to her belief about Santanna’s procedures. See August 19, 2002 letter, p. 3 (Exhibit 5 hereto) (“You seem to want to know how CUB verifies whether a customer’s complaint is true or not, but Santanna’s own responses to CUB’s DRs show that Santanna takes each

complaint as true.... Why is it that you seek to hold CUB to a standard to which your own client does not adhere?”) (emphasis supplied). Of course, the inquiry has nothing to do with comparative standards, but was simply an inquiry, and the materials produced in this case now reveal why it is an important inquiry, i.e., not all customer complaints are true. Therefore, because CUB provides no support for the veracity of its many complaints, its proffered exhibits should be stricken as hearsay. See In re Estate of Teall, 329 Ill. App. 3d 83, 91, 768 N.E.2d 124, 132 (1st Dist. 2002) (holding that document was inadmissible where no proper foundation was laid for an exception to the hearsay rule). What is plain from CUB’s “complaints” is that they are merely paraphrased reports of complaints to CUB, rather than admissible evidence.

15. None of the foregoing challenges to Kolata’s qualifications are intended to reflect personally on Kolata, or even on the areas in which he may be an expert (e.g., political science or the legislative process). However, Kolata has not offered testimony on those topics, so his qualifications about the topics in this proceeding are appropriately called into question here.

16. Alternatively, Santanna requests the opportunity to voir dire Kolata to determine his qualifications to render expert opinions on the topics stated prior to submission of his testimony.

WHEREFORE, Santanna respectfully moves the Commission to strike the portions of Kolata’s testimony for which he offers unqualified opinions and for such other relief as the Commission deems proper.

SANTANNA NATURAL GAS CORPORATION,

By: _____
Paul F. Markoff, One Of Its Attorneys

Dated: August 26, 2002

Mr. Paul F. Markoff
Crowley Barrett & Karaba, Ltd.
20 South Clark Street
Suite 2310
Chicago, Illinois 60603-1895
312.726.2468

G:\CLIENTS\SANTANNA\ICC\Pleadings\strike kolata testimony mtn.doc